FILED
SEP 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

—v.—

DOROTHY ELLENDER, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Is a certiorari petition timely when:

(a) the question presented in the petition--whether a final judgment was entered in the district court--was fully litigated on a prior appeal to the court of appeals which affirmatively decided this question in an opinion dismissing the appeal as time-barred, and (b) the court of appeals also denied a petition for a writ of mandamus to compel the district court to enter a new judgment, and (c) no timely petition for certiorari was filed from these court of appeals decisions, and (d) the certiorari petition is filed from a subsequent decision of the court of appeals dismissing as moot a later appeal in the same case raising the identical question, and (e) the only question raised in the certiorari petition concerns the correct-

ness of the earlier court of appeals' decisions, from which no certiorari petition was filed?

(2) Where a judgment disposing of all the remaining issues in a case is set forth on a separate document, and its contents are duly summarized in the clerk's docket, and the court sends to the clerk a memorandum filed in the permanent court record stating that the accompanying judgment "closes the case," and the losing party abandons his remedies under Fed. R. Civ. P. 60(b) to revise the judgment, is the losing party's time to appeal nonetheless extended indefinitely because the judgment does not explicitly mention all relief previously ordered by the court?

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In the Supreme Court of the United States
October Term, 1986

No. 86-120

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS,

V.

DOROTHY ELLENDER, ET AL., RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION TO TO THE PETITION FOR CERTIORARI

Respondents respectfully submit this brief in opposition to the petition of the Secretary of Health and Human Services for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

COUNTERSTATEMENT OF THE CASE

The Secretary's selective statement of the case, purporting to simplify a convoluted procedural history, is misleading and does not disclose facts crucial to the proper disposition of this petition.

First, the Secretary mischaracterizes the decision below as a decision on the merits of whether the district court had entered a final judgment. In fact, the decision below does nothing more than dismiss the Secretary's appeal as moot because the issue presented (whether the judgment below had been improperly entered) was previously decided in a prior appeal in the same case. In that prior appeal, docketed as 85-6274, the court of appeals dismissed the Secretary's appeal on the merits as time-barred; the court rejected the Secretary's claim

that the time to appeal had not run because no proper judgment had been entered below. No timely certiorari petition was filed from the decision in 85-6274.

Second, the Secretary's certiorari petition does not disclose that the exact relief sought here--an order directing the district court to enter a new judgment--is identical to the relief sought and denied in a prior petition to the court of appeals for a writ of mandamus. The Secretary's certiorari petition does not even mention the mandamus petition. The mandamus petition, docketed as 85-3066, was referred to the same panel that heard 85-6274 (the appeal on the merits), and was denied simultaneously with the decision in 85-6274, dismissing the Secretary's appeal on the merits as untimely. The order denying the petition for the writ

of mandamus expressly referred to the opinion in 85-6274 holding that a final judgment had already been entered. The decisions in both 85-6274 and 85-3066 were issued before the decision below and the time to petition for certiorari from both decisions has long since expired.

Third, the Secretary misrepresents the position he took in the court of appeals in 85-6274 (the appeal on the merits) by stating that he had only "suggested" that the court entertain the appeal on the merits, and that he had conceded the appeal was premature (Pet. 7). In fact, the Secretary never suggested the appeal was premature: he filed a notice of appeal on the merits, and the sole issue briefed and argued when plaintiffs moved to dismiss the appeal was whether the appeal was too late.

In addition to failing to reveal facts crucial to determining the timeliness of this petition, the Secretary has omitted facts relevant to the court of appeal's holding in 85-6274 (the court of appeals' first decision dismissing the appeal on the merits) that a final judgment had been entered in this case and no timely appeal had been filed. Accordingly, respondents shall set forth a full factual statement.

1. This case is a class action challenging practices of the Social Security Administration ("SSA") under its 1982 Backlogged Debt Management Project. Under this project, SSA sought to recover alleged overpayments of Supplemental Security Income ("SSI")[1] benefits from former SSI recipients who had since

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[1]. The SSI program provides benefits to needy aged, blind and disabled persons. 42 U.S.C. 1381 et seq.

become recipients of Old Age Survivors, and Disability Insurance ("OASDI") benefits[2]. These SSI debts generally resulted from computer errors and dated back to the early 1970's when the SSI program was initiated. Because OASDI benefits enjoy complete immunity from transfer, assignment, garnishment or any other legal process pursuant to 42 U.S.C. 407[3], SSA sought an indirect method of

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[2]. The OASDI program provides Social Security benefits to retired or disabled wage earners and their dependents. It is financed by contributions from wage earners and their employers. 42 U.S.C.401 et seq.

[3]. 42 U.S.C. 407 provides: "(a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law. (b) No other provision of law, enacted before, on, or after the date of the enactment of this section may be construed to limit, supercede, or otherwise modify the provisions of this section except to the extent that it does so by express

collecting these debts by inducing beneficiaries to consent to "voluntary" reductions in current benefits.

2. Named plaintiff Dorothy Ellender[4], an elderly Social Security recipient, joined by several other similarly situated individuals, challenged defendant's practice of collecting alleged overpayments by sending coercive notices suggesting that recipients consent to having their Social Security benefits withheld or reduced. The plaintiffs claimed the Social Security Act did not permit the defendants to collect alleged overpayments received under the SSI

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reference to this section."

[4]. Dorothy Ellender was 74 years old when this case was filed. She is now 78 years old. Her sole source of income is her monthly Social Security (OASDI) widow's benefit check. In Mrs. Ellender's case, the Secretary sought to withhold Mrs. Ellender's widow's benefits in order to recover alleged overpayments of SSI made in 1974 and 1975.

program by reducing OASDI benefits. Plaintiffs also claimed that the notices sent them regarding the alleged debts were misleading and failed to advise recipients of their right to appeal the alleged overpayments, their right to have repayment waived under the provisions of 42 U.S.C. 1383(b)(1) [5], or of their protection against repayment under 42 U.S.C. 407 and the applicable statute of limitations.

3. On August 12, 1982, the district court granted plaintiffs' motion for a temporary restraining order prohibiting the Secretary from carrying out his challenged policies and practices. On October 26, 1982, the court granted plaintiffs' motions for a

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[5]. Repayment of an SSI overpayment may be "waived" by the Secretary if the overpayment was not the fault of the beneficiary and if repayment would cause hardship or violate the purposes of the Social Security Act. 42 U.S.C. 1383(b)(1).

preliminary injunction and for class certification. Ellender v. Schweiker, 550 F. Supp. 1348 (S.D.N.Y.1982). On November 17, 1983, the court granted plaintiffs' motion for partial summary judgment, and issued an order permanently enjoining the challenged debt collection practices. Ellender v. Schweiker, 575 F. Supp. 590 (S.D.N.Y. 1983), (Pet. 27a-63a). The Secretary did not appeal from these orders even though they were immediately appealable under 28 U.S.C. 1292(a)(1).

4. Plaintiffs subsequently moved for attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d), based on their claims that they had prevailed in the case and that the Secretary's position was not substantially justified. By decision dated April 10, 1984, the court granted, in part, plaintiffs' motion for fees.

Pursuant to the court's direction, the parties negotiated the amount of the fees payable under the decision, and entered into a stipulation as to that amount on July 18, 1984.

5. A stipulation and order dismissing the remaining claims of individual class members for damages was entered on December 19, 1984. At this point, there were no outstanding issues remaining to be decided by the court and the court's decision on the merits was in all respects final.

6. On January 3, 1985, the court entered a judgment which read as follows:

> Upon the annexed opinion and order of the Court entered April 12, 1984 and the annexed stipulation and order entered July 20, 1984 it is Adjudged that the plaintiffs'counsel do have and recover of the defendants the sum of $40,734.30. (Pet. 7a).

In forwarding this judgment to the clerk, the district court judge

instructed the clerk as follows: "This judgment closes this case. If for any reason this action cannot be closed, please advise Chambers immediately ...." (Pet. 7a). The memorandum containing this instruction was attached to the judgment and filed in the permanent court record. The judgment was duly docketed and the docket sheet indicates a copy of the judgment was mailed to the parties.[6] The Secretary was also put on notice of the entry of this judgment by a notation published in the New York Law Journal on January 8, 1985. (Pet. 7a).

7. On March 28, 1985, the Secretary moved under Rule 60(b) of the Federal Rules of Civil Procedure for an order vacating the January 3, 1985 judgment. The Secretary's moving papers stated that, due to law office failure,

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[6]. The Secretary claims he did not receive his copy.

he had failed to notice the notation in the Law Journal indicating that judgment had been entered. The Secretary also requested that the court enter a new judgment reflecting both the attorney's fee award and the terms of the permanent injunction that had been in effect since November, 1983. By decision dated July 19, 1985, the district court denied this motion.

8. On September 17, 1985, the Secretary filed a notice of appeal to the United States Court of Appeals for the Second Circuit from the permanent injunction order of November 17, 1983, the denial of defendants' Rule 60(b) motion and any judgment to be entered. This appeal was docketed as 85-6274.

9. On October 7, 1985, while the appeal in 85-6274 was pending, the district court issued a one page order refusing to enter a new judgment on the

merits. This order was issued in response to a letter from the Secretary requesting a new judgment.

10. The parties agreed to postpone briefing on the merits of the Secretary's appeal to the court of appeals to permit the court to determine first whether the appeal of the merits was timely. Plaintiffs then moved to dismiss as untimely the Secretary's appeal, except the appeal from the denial of the Secretary's 60(b) motion to vacate the judgment, which the parties agreed was timely. The Secretary argued (and plaintiffs did not dispute) that the appeal on the merits was not premature. The only issue was whether the appeal on the merits was too late.

11. The Secretary then petitioned the court for a writ of mandamus compelling the district court to issue a new final judgment. This petition was

docketed as 85-3066 and was referred to the same panel that was considering the motion to dismiss in 85-6274, the Secretary's appeal on the merits. The issue before the court in both the mandamus petition and the motion to dismiss the appeal on the merits was the same: whether a final judgment had been properly entered in January, 1985.

12. The day after the Secretary submitted his petition for a writ of mandamus, and the day that he submitted his brief in opposition to plaintiffs' motion to dismiss, the Secretary filed a separate notice of appeal from the district court's order of October 7, 1985 refusing to enter a new judgment. This appeal was docketed as 85-6332; it is the decision on this appeal from which the Secretary now seeks certiorari. When the Secretary submitted his brief in this second appeal to the court of appeals, he

explained his duplicative appeal[7] as follows:

> The question presented by the instant appeal is already before the panel of this Court (Judges Kearse, Pratt and Timbers) that is considering the motion of the plaintiffs to dismiss in part, as untimely, the Government's appeal on the merits in Ellender v. HHS, No 85-6274... That motion was argued on November 12, 1985 and is presently sub judice. The Government has also filed a petition for a writ of mandamus (Ellender v. HHS, No. 85-3066) seeking to compel Judge Cooper to direct the entry of a final judgment. It is the Government's understanding that the mandamus petition was referred to the panel considering the aforementioned motion to dismiss. The instant appeal is being pursued in addition to the petition for writ of mandamus because there is a split in the circuits as to the appropriate procedure for challenging an order of the type at issue here, and this

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[7]. Respondents filed a motion with the court of appeals, to which the Secretary consented, to consolidate the two appeals. The motion, however, was not considered until after the decision in the first appeal when it was denied as moot because the first appeal had already been decided.

> Court has not spoken on the subject. (Brief for Defendants-Appellants, No 85-6332, at 5 n.**)

13. On January 15, 1986, the court of appeals issued its opinion in 85-6274 dismissing the appeal on the merits as untimely because it was filed more than sixty days after the entry of final judgment. On the same day, it issued an order in 85-3066 denying the petition for writ of mandamus. This order stated: "It is ordered that said petition be and it hereby is DENIED. See opinion filed today in No. 85-6274."

14. Five days later, the Secretary submitted his reply brief in 85-6332, the appeal from the October 7, 1985 order refusing to enter a new judgment. The brief conceded that the issue on the appeal had been decided but suggested that the court of appeals could reconsider its ruling in 85-6274 because

"[t]he principle of law of the case is purely discretionary and does not deprive the Court of the power to consider issues previously ruled upon." (Reply Brief of Defendant-Appellants, No. 85-6332, at 2 n.* (Emphasis added)).

15. While the appeal in 85-6332 was pending, the Secretary petitioned for rehearing in 85-6274[8]. The petition stated that the issue for review was that decided in the January 15, 1986 opinion: whether the final judgment issued in January, 1985 commenced the time to appeal on the merits. The rehearing petition nowhere suggested that the court's disposition of the motion to dismiss was correct because the appeal was premature. In fact, the rehearing petition states that the issue of the district court's intent goes "to the

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[8]. The Secretary's petition fails to disclose the rehearing petition or its outcome.

existence of appellate jurisdiction, a fact not disputed by the Government." (Appellant's Petition For Rehearing, No. 85-6274, at 2). The petition for rehearing was denied on February 21, 1986.

16. The court of appeals' January, 1986 opinion dismissing the Secretary's appeal on the merits as untimely had specifically stated that it was expressing no view on the merits of the Secretary's timely appeal of the denial of the motion to set aside the judgment. (Pet. 13a). But while the petition for rehearing was pending, the Secretary abandoned his remedy under Rule 60(b) by stipulating to a dismissal with prejudice of the appeal from the district court's denial of the Rule 60(b) motion.

17. On April 28, 1986, the court of appeals dismissed the appeal in 85-6332 as moot. The panel observed that:

> The Secretary has recognized that the principal question presented here i.e.. whether final judgment had been entered in the district court prior to his motion for entry of such judgment, was already before this court in connection with plaintiffs' motion to dismiss in No. 85-6274. (Pet. 2a).

The court did not address this question on the merits. Instead it stated:

> In a decision filed on January 15, 1986, we granted plaintiffs' motion to dismiss in No. 85-6274, ruling that a final judgment had been entered in the district court no later than January 4, 1985. Ellender v. Schweiker, 781 F.2d 314 (2d Cir. 1986). Accordingly, the present appeal from the denial of the Secretary's March 1985 motion for entry of judgment became moot. (Pet. 2a-3a).

The court further observed that the Secretary had abandoned his challenge to the denial of his Rule 60(b) motion. It concluded:

> Whatever arguments the Secretary might have advanced in favor of the revival of his rights to have reviewed any

> decision of the district court made prior to entry of the January 1985 judgment could have been made in No. 85-6274. Those arguments may not be made here. (Pet. 3a).

The Secretary did not file a petition for rehearing in 85-6332.

18. The Secretary subsequently applied for and obtained an extension of time to file a petition for writ of certiorari in 85-6274, the court of appeals first decision dismissing the appeal on the merits. Under this extension, the Secretary's petition was due on June 21, 1986. No petition was filed.

19. The certiorari petition now before the Court was filed on July 25, 1986. The petition purports to seek review of the decision in 85-6332, (the decision dismissing the Secretary's second appeal as moot), but the only questions raised concern the correctness

of the court of appeals' January 15, 1986 determinations dismissing the appeal and denying the mandamus petition, from which no timely certiorari petitions were filed.

REASONS FOR DENYING THE WRIT

The Secretary has missed one time limitation after another: first, by attempting to collect overpayments from members of the plaintiff class long after the statute of limitations had expired; next--having been enjoined from pursuing illegal debt collection techniques--by failing to keep apprised of whether a judgment was entered after the case was concluded, although the judgment was mailed to him and entry of the judgment was published in the New York Law Journal; next, by failing to keep track of his own multiple efforts to obtain identical relief; and finally, by failing to observe the jurisdictional time limits for petitioning to this Court. He seeks by this late petition to revive a late appeal to the court of appeals to challenge an injunction, the terms of which have been settled for close to

three years.[9]

I. THE PETITION SHOULD BE DISMISSED AS UNTIMELY

The time limitation for petitioning for a writ of certiorari in a civil case is jurisdictional. Pursuant to 28 U.S.C. 2101, a petition must be filed within ninety days of the judgment or decree of the court of appeals, absent an extension granted by a Justice of the Supreme Court. Extensions may be granted for no more than sixty days. 28 U.S.C. 2101. This time limitation may be tolled only by a timely petition for rehearing filed in the Court of Appeals. See Supreme Court Rule 20. If a petition does not

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[9]. In light of the procedural complexities of this case, and the fact that critical facts are omitted from the Secretary's petition, this case is particularly inappropriate for summary disposition on the merits. See Stern, Gressman, Shapiro, Supreme Court Practice, (6th ed. 1986) 280-286.

meet these time limitations, this Court has no jurisdiction and the petition must be dismissed. See Department of Banking v. Pink, 317 U.S. 264, 266 (1942).

In this case, the court of appeals' decision ruling that a final judgment had been entered and dismissing the government's appeal on the merits was issued on January 15, 1986. A petition for rehearing was denied on February 21, 1986. The Secretary next sought, and was granted, an extension of time to petition for certiorari. Pursuant to this extension, the Secretary could file a petition for writ of certiorari up until June 21, 1986. Having failed to file a petition within this time period, the Secretary is barred by 28 U.S.C. 2101 from petitioning for review of the January 15, 1986 decision.

The Secretary nonetheless seeks review of the "reasoning" of the court of

appeals' decision of January 15, 1986, by styling his request for review as a petition from the court of appeals' subsequent order dismissing the appeal in 85-6332 as moot. The Secretary suggests that the decision in 85-6332 extends the time to petition from the decision in 85-6274 because "the Court of Appeals' decision in No. 85-6332 relies on the reasoning expressed in the opinion in No.85-6274...." (Pet. 11 n. 8). He further seeks to excuse his failure to petition from 85-6274 based on his newly adopted view that his own appeal on the merits in 85-6274 was premature, and that it was therefore correct for the circuit to dismiss the appeal even though the Secretary argued against dismissal in the circuit court. Rather than offering an excuse for his failure to petition from the denial of his mandamus petition, the Secretary does not mention the mandamus

petition in his petition for certiorari.

The Secretary's arguments for extending his time to petition are squarely contradicted by this Court's pronouncements on its jurisdictional limitations. This Court has long recognized that the time limitation for petitioning for a writ of certiorari in a civil case is not extended merely because the court of appeals issued a subsequent order in the same case. See Federal Trade Commission v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 213 (1952); Stern, Gressman & Shapiro, Supreme Court Practice (6th ed.1986) at 314-16. Even when the court of appeals has amended its judgment, the time to appeal is not extended unless the amendment is substantive. Id. at 211-12. See King v. Preterm, 448 U.S. 901 (1980); Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. 374, 378-80 (1965); Federal

Power Commission v. Idaho Power Co., 344 U.S. 17, 20 (1952); Department of Banking v. Pink, 317 U.S. 264, 266-67 (1942). In Federal Trade Commission v. Minneapolis-Honeywell Regulator Co., for example, this Court dismissed a petition as untimely even though the second order of the court of appeals was entitled "Final Decree" and explicitly affirmed portions of the lower court's order that had not been addressed by the initial decision of the court of appeals. This Court explained:

> the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and

> obligations which by its prior judgment, had been plainly and properly settled with finality.

344 U.S. at 211-12 (footnotes omitted).

In this case, the April 28, 1986 order of the court of appeals is plainly not substantive. The order does not purport to amend any of the findings of the first panel's opinion of January 15, 1986. In fact, it does not address the merits of the Secretary's arguments, finding instead that the Secretary's redundant appeal was moot because the issue had already been disposed of in 85-6274. Because the opinion in 85-6332 did not address the merits or change any matters of substance, it cannot operate to extend the time to petition for certorari. See Federal Trade Commission v. Minneapolis-Honeywell Regulator Co., 344 U.S. at 211-12.

Similarly, any power of the panel in 85-6332 to alter the ruling in 85-6274 is

irrelevant in determining the time to petition this Court. As this Court stated in Market Street Railroad Co. v. Railroad Commission of California, 324 U.S. 548, 551 (1945), the finality of a court of appeals decision "is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment." Such finality may only be suspended by a timely petition for rehearing. Id at 552. In this case, the timely petition for rehearing in 85-6274 deferred the finality of the decision until February 21, 1986, when that petition was denied. Although the second panel might have taken the extraordinary step of reaching the merits and adopting a different result, this possibility in no way affected the finality of the result in 85-6274. See Market Street Railroad Co. v. Railroad Commission of California, 324 U.S. at

551.[10]

The Secretary disingenuously attempts to excuse his failure to petition from 85-6274, the court of appeals decision dismissing his appeal, by asserting that in his view, "the notice of appeal in No. 85-6274 was premature insofar as it sought to challenge the district court's ruling on the merits" and that, consequently, he does not "take issue with the disposition in that case." (Pet. 11 n. 8). This new-found view is a complete reversal of

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[10]. The Secretary's request to the second panel that it reach a different result on an issue decided by a prior panel is analogous to a request for rehearing en banc. It is well settled that such a request does not toll the time period for petitioning for writ of certiorari. See Stern, Gressman & Shapiro, Supreme Court Practice at 313. The time limitation is only tolled during the pendancy of a timely petition for rehearing. Here there was a petition for rehearing from the first panel's decision. The petition was denied on Feburary 21, 1986, and no timely certiorari petition was filed.

the Secretary's position in the circuit and ignores the reality that the circuit court dismissed the appeal not because it was too early but because it was too late.

By noticing an appeal on the merits in 85-6274, the Secretary affirmatively sought review, and obviously did not suggest that his appeal was premature. Plaintiffs in no way challenged the appeal as premature, but instead argued that the appeal was too late.[11] The parties fully litigated the issue whether the appeal on the merits was too late. The court specifically dismissed the appeal on the merits on the ground that it was too late. Furthermore, the Secretary's petition for rehearing

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[11]. It is well settled that when the appellee does not challenge an appeal as premature, the court of appeals need not dismiss the appeal on that ground. See Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978)(per curiam).

nowhere suggested the argument made here that the appeal should have been dismissed as premature. The Secretary's new "view" of the court of appeals' action is clearly no more than an attempt to cure his failure to submit a timely certiorari petition to review the court of appeals' decision.

Furthermore, even if the Secretary retrospectively agrees with the dismissal of his own appeal, he can hardly agree with the simultaneous denial of his petition for mandamus, seeking the identical relief the Secretary seeks here--an order requiring the district court to enter a new final judgment. The court of appeals denied this relief in denying the mandamus petition, based on the opinion in 85-6274 that final judgment had been entered no later than January 1985. To consider the certiorari petition "timely" under these circum-

stances would open the door to any litigant to extend indefinitely his time to petition for certiorari.

The Secretary would have this court dispense with all notions of finality to permit litigants to get repeated bites at the apple to appeal from a judgment after the time to appeal had lapsed: First, the litigant appeals and argues that there is no judgment. Second, he asks the appellate court for a writ of mandamus to require the district court to enter a new judgment. Finally, when both these attempts to revive his rights are rejected, the litigant need not seek review in this Court or pursue his remedies under Rule 60(b) to have the judgment vacated. Instead he can make a motion at any time to the district court requesting entry of a new judgment. When this is denied he can file a repetitive appeal to the court of appeals, and if

this appeal is rejected, he can cure his earlier failure to timely petition by simply filing a petition following the court of appeals' dismissal of the second appeal. Such a result completely abandons the principle of finality and leads to an enormous waste of judicial resources[12] since even appellate rulings on the finality of judgments could never be considered final.

Furthermore, by leaving the finality of judgments unsettled, the Secretary's approach means that litigants can never be assured that their rights have been settled. This is a particular hardship to the elderly and disabled members of the plaintiff class who live on subsistence incomes and who brought this case to challenge an overreaching attempt

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[12]. Here the Secretary had two appeals, one mandamus petition, and one petition for rehearing before the court of appeals, all raising the identical issue.

by the Secretary to collect alleged SSI overpayments, which in some cases occurred more than ten years ago.[13]

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[13]. By letter dated August 1, 1986, respondents put the Secretary's counsel on notice that the petition was untimely and requested that it be withdrawn so as to avoid the unnecessary expenditure of respondents' and the Court's time and resources to respond to the petition. No action was taken, however, to withdraw the petition. Because the petition is so patently untimely, and a response to the petition has caused an unnecessary diversion of legal resources from other needy elderly and disabled clients, respondents respectfully request that this Court consider the imposition of sanctions under Supreme Court Rule 49.2 and 50 or counsel's fees for unreasonably multiplying proceedings under 28 U.S.C. 1927.

THE COURT OF APPEALS CORRECTLY RULED THAT THE JUDGMENT ENTERED BY THE DISTRICT COURT MET THE REQUIREMENTS OF FED. R. CIV. P. 58 AND 79 (a) AND THAT THE SECRETARY COULD NOT NOW FILE AN APPEAL ON THE MERITS FROM THE PERMANENT INJUNCTION ENTERED IN NOVEMBER, 1983.

The Secretary, having failed to appeal in time from the district court judgment, now seeks this Court's help to establish rules that would wreak havoc with principles of finality of judgments. The Secretary argues that despite the fact that all issues in the case were finally adjudicated by the district court, and despite the fact that a judgment on a separate document was entered, and despite the district court's memorandum filed in the permanent court record stating that the "judgment closes the case," his time to appeal to the court of appeals has not begun to run because the judgment explicitly mentions only attorney's fees (awarded as a direct consequence of the plaintiff's having

prevailed in the case). The Secretary's position is that because the final judgment does not expressly mention the permanent injunction, granted by court order in 1983, he can appeal from the injunction years later simply by requiring the district court to issue a new judgment.

The petition for certiorari disguises itself as an effort to compel adherence to principles announced in United States v. Indrelunas, 411 U.S. 216, 218 (1973), holding that Rule 58 of the Federal Rules of Civil Procedure must be applied mechanically to require a judgment to be set forth on a separate document in order for the time to appeal to start to run. But the court of appeals did not question the holding of Indrelunas. As the circuit court ruled, there was strict compliance here with the requirements of Rules 58 and 79(a): the

January 4, 1985 judgment was set forth on a separate document and its contents were summarized in the clerk's docket, as the Federal Rules and Indrelunas require.

The Secretary quarrels with the court of appeals' statement that there is "no requirement in the Federal Rules of Civil Procedure that the document that constitutes the final judgment in a case be comprehensive." (Pet. 12a-13a). The Secretary argues that it is important for this court to grant certiorari to clarify what has to be in a judgment, so that litigants will know when their time to appeal starts to run. This argument obscures the reality here that the Secretary did not miss the time to appeal because of the contents of the judgment; he missed the time to appeal because he failed to notice that any judgment had been entered. As the court below noted:

We have little doubt that if

> the government attorneys had followed up on the notice published in the New York Law Journal on January 8, 1985, or had read the January 4 judgment and the court's memorandum that accompanied it, they could not have failed to recognize that the final judgment in the case had been entered. (Pet. 13-a).

Although it is undisputed that the Secretary missed the notation in the Law Journal[14], he argues that this case is important because even if he had learned of the district court's judgment he would not have realized that his time to appeal was beginning to run. This argument is belied by the Secretary's own conduct in this case. As the Secretary himself concedes, he promptly moved to have the judgment vacated and re-entered as soon as he became aware that it had been entered and that his time to appeal had

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[14]. The Secretary also claims he did not receive the copy of the judgment mailed by the clerk. Under Fed. R.Civ. P. 77 (d) a party's failure to receive notice of a judgment does not affect the time to appeal.

lapsed. (Pet. 6). Indeed, a party cannot safely ignore a document purporting to end the litigation when all issues have been decided in the hopes that it will not be deemed the judgment. Beaudry Motor Company. v. Abko Properties Inc., 780 F. 2d 751 (9th Cir. 1986), (appeal untimely; minute order denying post-trial motions was a final judgment from which a party's time to appeal runs.)[15] As the court of appeals also noted, nothing in the Federal Rules requires any particular form of judgment. F. R. Civ. Proc. 54(a) provides that:

> "Judgment" as used in these rules includes a decree and any

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[15]. In Beaudry, the court noted that "plaintiff's counsel received a document, the sole contents of which informed him that his post-judgment motions had been ordered denied and which was file stamped. We have no trouble concluding that in these circumstance a reasonable person would realize that the court had entered an order finally disposing of the case." 780 F.2d 751, 755 n.3.

> order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

As the court of appeals held, it is irrevelant that the final judgment referred only to the fee award:

> We see no reason...why an award of fees may not be made prior to or simultaneously with the entry of final judgment...When all issues as to the merits have been decided and a judgment is entered by which the court clearly intends to close the case, i.e. to enter a final judgment, the fact that the judgment disposes of the matter of fees does not make the judgment less final. (Pet. 11a).

Thus, even if the district court does not observe the technical rules for entering a final judgment in its order disposing of all of the issues on the merits, the fee judgment "sets the outer limit within which the notice of appeal must be filed." Exchange National Bank of Chicago v. Daniels, 763 F. 2d 286, 292 (7th Cir. 1986). Had a timely appeal

been filed from the January judgment, the Secretary could have raised all the issues in the case. See United States v. Clark, 445 U.S. 23, 25-26 n. 2 (1980). Although the January, 1986 final judgment does not refer to the merits, the only reason for granting attorneys' fees was that plaintiffs had prevailed on the merits. Under all the circumstances here, the court of appeals was correct in not permitting the various strategems proposed by the Secretary to permit a late appeal.

The cases the Secretary relies on are inapposite. Because U.S. v. F. & M. Schaefer Brewing Co., 356 U.S. 227 (1958) was rendered before the 1963 amendment of the Federal Rules to require a judgment to be on separate document, much of its reasoning is now inapplicable. It should be noted, however, that the circumstances in that case--the failure to state the

amount of the judgment in the opinion or on the docket sheet, and the subsequent filing by the judge of a formal judgment--indicated that the district court did not intend that his opinion be the final judgment in the case. 356 U.S. at 235-6. Similarly, in C.I.T. Financial Service v. Yeomans, 710 F. 2d 416 (7th Cir. 1983), there was no opinion, transcript, order or any other document evidencing the court's disposition of the case. Here, in contrast, there was a judgment[16] on a separate document as well as a memorandum

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[16]. A judgment must be given a commonsense reading to include prior orders and reflect the court's disposition of the case. See Bandag Inc. v. Al Bolser Tire Stores, 719 F. 2d. 392 (Fed. Cir. 1983)(final judgment on a separate document effectively encompassed all prior orders even though these were not explicitly mentioned in the judgment. See also In re Forstner Chain Corporation, 177 F. 2d. 572, 578(1st Cir. 1949)(claim that judgment for costs was not final judgment on the merits was "overrefined technicality" at variance with intent of district judge who intended judgment to be his final disposition of the case).

from the district judge which was filed in the permanent court record stating "this judgment closes the case." There was no doubt about what happened or the terms of the injunction or the fee award. The Secretary's problem with the judgment is not its form, but that he missed it.

Finally, it should be noted that the Federal Rules provide ample remedies short of Supreme Court certiorari petitions for a litigant aggrieved by perceived deficiencies in judgments or confused by the circumstances of the entry of the judgment. These safeguards may explain why the issue raised by the Secretary is not one which has frequently engaged the lower courts.

Rule 4(a)(5) of the Federal Rules of Appellate Procedure permits the district court to extend a party's time to fil a notice of appeal "upon a showing of excusable neglect or good cause...upon a

motion filed not later than 30 days after expiration of the time prescribed by this Rule 4(a)." Here, although the Secretary learned of the final judgment in time to move under Rule 4 (a)(5), he failed to do so.

To the extent that a party is aggrieved by the form or contents of the judgment. Rule 60(a) of the Federal Rules of Civil Procedure provides that "clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party..."[17] Rule 60(b)

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[17]. The alleged "error" here is the failure specifically to include the permanent injunction order in the judgment. Here, the order granting the injunction was clear and explicit as to the terms of the injunction and adding its terms to the judgment in no way would change the substantive relief awarded. Indeed, the Secretary has been complying with the injunction for over four years. Thus this correction would be of the

permits the court to relieve a party from a final judgment for a variety of specified reasons (for example, mistake, misconduct by the adverse party) or for "any other reason justifying relief from the operation of the judgment" Rule 60(b) is occasionally used to permit re-entry of a judgment to permit a timely appeal. See, e.g., Rogers v. Watt, 722 F.2d 456 (9th Cir. 1983). Here the Secretary in fact moved to vacate the January, 1985 judgment and for entry of a new judgment, but when that motion was denied, he inexplicably abandoned his timely appeal of the denial of that motion. He abandoned this appeal despite the clear statement by the court of appeals that their dismissal of his appeal on the merits as untimely did not affect his concededly timely appeal of the denial of the Rule 60(b) motion, that the issue of

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type covered by Rule 60(a).

whether the Secretary's failure to become aware of entry of judgment entitled him to relief from the judgment would be dealt with in that appeal and that the court expressed no view as to the merits of the Rule 60(b) appeal. (Pet. 13a).

The Secretary's failure to pursue the Rule 60(b) appeal was noted by the second panel of the court of appeals in dismissing as moot the Secretary's appeal from the district court's denial of the Secretary's motion to enter a final judgment:

> Whatever arguments the Secretary might have advanced in favor of the revival of his rights to have reviewed any decision of the district court made prior to entry of the January 1985 judgment could have been made in No. 85-6274 [the docket number of the abandoned appeal from the denial of the Rule 60(b) motion]. Those arguments may not be made here. (Pet. 13a).

The lesson here is not that further clarification of these issues is needed;

it is that the Secretary has to pay attention to his cases. If after a permanent injunction is entered, the Secretary elects not to appeal for several years[18] but to wait for a judgment, the Secretary should not miss the judgment when it is finally entered.

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[18]. The Secretary's assertions regarding the importance of this case are belied by his torpor in pursuing his appeal of the merits and his cavalier abandonment of remedies under the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure.

CONCLUSION

For the reasons set forth above, the writ of certiorari should be denied.

Respectfully submitted,

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Dated: New York, New York
September 25, 1986